IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 23.01.2006

CORAM:

THE HON'BLE MR. JUSTICE K.MOHAN RAM

Second Appeal No.946 of 1995

Manickam .. Appellant/ Plaintiff

-Vs-

1. Sakunthala @ Rajeswari
2. Sundararajan
3. Muruganandam
4. Babu
5. Raghupathy
6. Saraswathi .. Respondents./ Defendants 1 to 6

Appeal against the judgment and decree dated of the learned I Additional District Judge of Coimbatore dated 08.08.1994 in A.S.No.172 of 1993 reversing the judgment and Decree of the II Additional District Munsif of Coimbatore dated 21.06.1993 in O.S.No.673 of 1983.

For Appellant : Mr. Nicholas.
For Respondents : Mr. J.Raja Kalifulla

J U D G M E N T

The plaintiff in O.S.No.673 of 1983 on the file of the Second Additional District Munsif Court Coimbatore, who succeeded before the Trial Court, but lost before the first Appellate Court, has filed the above second appeal.

2. The suit in O.S.No.673 of 1983 was filed by the appellant for partition and separate possession of her 1/3rd share in the suit property and for mense profits at Rs.250/- per month from the date of filing of suit, till possession is delivered to her.

3. For the sake of convenience, the parties are referred to as per their ranking in the suit.

4. The case of the plaintiff before the Trial Court is as follows:

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The suit property is a house property, bearing Door No.12/39 A in Arunthathiyar Street, Coimbatore. The suit house was originally purchased by one Savadammal by a Sale Deed Ex.A.5 dated 01.07.1956, from one Marimuthu Reddy for Rs.2,445/-. The eldest son Ponnuswamy got himself separated from the family. 1/4th share in the house property was settled in favour of the eldest son Ponnuswamy by the deceased Savadammal as per Ex.A.1, Settlement Deed dated 27.03.1972. There is no dispute with regard to the aspects.

5. The case of the plaintiff is that the original owner Savadammal died intestate on 10.07.1973. On the death of the said Savadammal, the plaintiff and the other son Ramachandran and another daughter the sixth defendant became entitled to 1/3rd share in the suit property. Defendants 1 to 5 are the legal heirs of the said Ramachandran. The plaintiff had issued a notice calling for the division of the suit property. On 08.03.1983, the first defendant issued a false reply stating that Savadammal had left a Will on 19.05.1973 under which the suit property was bequeathed in favour of Ramachandran the husband of the first defendant. Such a will in favour of the said Ramachandran could only be a forged Will and not genuine, valid and binding on the plaintiff and hence the suit is filed claiming partition of the 1/3rd share in the suit property.

6. Denying the averments in the plaint, Defendants 1 to 5 have filed the written statement contending as follows: The deceased Savadammal had much love and affection for Ramachandran, who was taking care of his mother till her death. The plaintiff and the sixth defendant are married and settled in life. The deceased Savadammal was conscious of the needs and responsibilities of the said Ramachandran and hence she bequeathed the suit property as per the Will dated 19.05.1973, by which she cancelled the earlier Will dated 27.03.1972. In fact, the husband of the sixth defendant had also attested the Will in favour of the said Ramachandran and hence the plaintiff and the sixth defendant are estopped from denying the genuineness of the Will dated 19.05.1973. In pursuance of the Will, the first defendant's husband Ramachandran had taken possession of the suit property and is in continuous possession of the suit property and the property tax is also transferred in the name of the said Ramachandran. After the death of the said Ramachandran, the plaintiff and the sixth defendant with a view to gain unfair advantage are trying to cause harassment to the helpless widow, the first defendant herein. The plaintiff is not entitled to claim any share in the suit property.

7. The sixth defendant filed a separate written statement inter-alia contending that one year after the death of Savadammal,

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Ramachandran came to her house and obtained her husband's signature in the alleged Will purported to have been executed by the said Savadammal. Late Savadammal did not execute any such Will, either in favour of Ramachandran or in favour of his family members. On the date when her husband signed in the Will, Savadammal was not alive and hence the unregistered Will, said to have been executed by the said Savadammal does not have any binding force either on the plaintiff or on the sixth defendant. But in the Trial, the sixth defendant remained ex-parte.

8. On the above said pleadings, the Trial Court framed the following issues:

i) Whether the plaintiff is entitled to one-third share in the suit?

ii) Whether the plaintiff is entitled to mense profits, as claimed?

iii) Whether the Court Fee paid is correct?

iv) To what relief the plaintiff is entitled to?

But unfortunately, the Trial Court did not frame any issue regarding the validity of Ex.B-1, Will. But, however, the Trial Court elaborately discussed in its judgment about the various circumstances put forth by both the parties regarding the validity of the Will.

9. The Trial Court on a consideration of the oral evidence, came to the conclusion, that the following are the suspicious circumstances:

a) As per Ex.A.1 Settlement Deed the late Savadammal had settled 1/4th share in favour of her eldest son and on the same date 27.03.1972, Savadammal had executed a registered Will bequeathing 1/4th share in the property to the plaintiff, the sixth defendant and the deceased Ramachandran. There is a glaring inconsistency in the manifest intention of the deceased Savadammal as per the earlier Will and Ex.A.1.

b) Exclusion of the two daughters and the preference of the younger son Ramachandran.

c) In view of the fact that Savadammal was ill towards the end of her life, she could not have executed Ex.B.1, unregistered Will, out of her own volition.

d) Late Ramachandran actively participated in the

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preparation of the Will, Ex.B.1.

The Trial Court pointing out certain contradictions in the deposition of D.Ws.1 and 2, the attestors of Ex.B.1 Will, did not accept the evidence and held that the Ex.B.1 has not been proved in accordance with law beyond doubt and accordingly decreed the suit as prayed for by the plaintiff.

10. Being aggrieved by the judgment and decree dated 21.06.1993, passed in O.S.No.673 of 1983, defendants 1 to 5 filed A.S.No.172 of 1993 before the learned First Additional District Judge, Coimbatore.

11. The lower Appellate Court framed the following points for determination in the appeal, namely:

i) Whether the contention of the plaintiff that Ex.B.1, Will is a forged one is acceptable?

ii) Whether the contention of the plaintiff that Ex.B.1, Will is not executed by the deceased Savadammal out of her own volition is acceptable?

iii) Whether the defendants 1 to 5 have proved due execution of the Will?

iv) Whether the various circumstances stated to be the suspicious circumstances by the Trial Court are sufficient to invalidate the Will?

v) Whether the conclusion of the Trial Court that the plaintiff is entitled to 1/3rd share in the suit property is acceptable?

The lower Appellate Court on an independent and elaborate consideration of the oral and documentary evidence adduced in the case, disagreed with the reasonings and findings of the Trial Court and held that by examining P.W.s 1 and 2, the attesting witnesses of Ex.B.1 Will, defendants 1 to 5 have proved the due execution of the Will Ex.B.1 and further held that defendants 1 to 5 have discharged the initial burden and hence the burden has shifted to the plaintiff to prove that Ex.B.1 is a forged will. The lower Appellate Court on a consideration of the evidence on record held that, though the consistent stand of the plaintiff and the sixth defendant in their pleadings is that the alleged Will in favour of late Ramachandran is a forged and created one, during the course of the Trial and arguments, the plea of forgery had been given a go-bye. The lower Appellate Court has also pointed that D.Ws.1 and 2 were also not cross-examined regarding the mental faculty of late Savadammal. The lower Appellate Court considering the evidence of

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D.W.3/first defendant found that Savadammal was admitted in the hospital prior to her death and she died in the hospital. Prior to her death, while Savadammal was in the hospital, the plaintiff took care of her, for about 10 to 15 days and merely Savadammal was in hospital, for a short while, Ex.B.1 Will cannot be alleged to be a forged one. The lower Appellate Court has also pointed out an important aspect that the plea that Savadammal was in the hospital under the care and custody of the plaintiff was neither pleaded in the plaint nor in the written statement of the sixth defendant and therefore has held that no importance could be attached to the answers elicited in the unguarded moment in cross-examination of D.W.3. The lower Appellate Court has also pointed out that P.Ws.1 and 2 have also not deposed that deceased Savadammal could not execute the Will as she was admitted in the hospital for a continuous period of time prior to her death.

12. On the above said reasoning, the lower Appellate Court rejected the contention of the plaintiff that the Will, Ex.B.1 is a forged one and the same could not have been executed by Savadammal.

13. The Lower Appellate Court independently considered the evidence in respect of suspicious circumstances alleged by the plaintiff and disbelieved the evidence and the lower Appellate Court also considered the alleged active participation of Ramachandran in the execution of the Will and came to the conclusion that mere participation of said Ramachandran in the process of execution of the Will does not lead to the conclusion that Savadammal was pressurized and was under stress from Ramachandran to execute the Will Ex.B.1. The lower Appellate Court rightly kept in mind the fact that the exclusion of the daughters, the plaintiff and the sixth defendant throws considerable doubt upon the genuineness of Ex.B.1 Will and took care to consider the evidence with extra care and came to the conclusion that, when due execution is proved, the Courts cannot sit over the subjective satisfaction of the testator and for its conclusion, the Lower Appellate Court relied upon a judgment of the Apex Court reported in (A.I.R.1971 Supreme Court Page No.2236, Sushila Devi Vs. Pandit Krishna Kumar Missir and Others). One of the reasons recorded by the Trial Court for rejecting Ex.B.1, Will was that no reason is indicated for cancelling the earlier Registered Will. The Lower Appellate Court considered that aspect also and held that it is not imperative for the testator while executing the second Will to state the reasons for canceling the earlier Will. The Lower Appellate Court on a careful analysis of the entire evidence on record held that the due execution of the Will Ex.B.1 has been proved by defendants in the manner known to law and reversed the judgment and decree of the Trial Court and allowed the appeal.

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14. Aggrieved by the judgment of the Lower Appellate Court, the plaintiff has filed the above second appeal. While admitting the second appeal, the following substantial question of law has been formulated:

> "Whether the judgment of the lower Court is vitiated by its failure to apply the correct principles of law laid down by the Supreme Court of India while considering the genuineness of Will?".

15. I heard Mr. V.Nicholas, learned counsel appearing for the appellant and Mr. J.Raja Kalifulla, learned counsel appearing for the respondents.

16. Though, learned counsel for the appellant, argued extensively pointing out the various minor discrepancies in the evidence adduced by the defendants he did not submit that the lower Appellate Court has not applied the correct principles of law laid down by the Supreme Court of India, while considering the genuineness of the Will. But what he submitted is that the lower Appellate Court has not properly appreciated the evidence on record.

17. I am of the view that, in view of the limited scope for interference, in a second appeal under Section 100 C.P.C. as laid down by the Apex Court in a catena of decisions, unless the case fell within one of those categories of cases where the High Court may be justified in looking at the evidence afresh, this Court cannot interfere with findings of facts recorded by the lower Appellate Court which is the final Court of facts. The mere fact that on appreciation of the evidence the Appellate Court came to record a finding from which, it may be possible to differ is not a sufficient ground for interfering in Second Appeal. In 2005 (9) SCC 232, (Commissioner Hindu Religious & Charitable Endowments Vs., P.Shanmugama and others), the Apex Court has laid down that the High Court has no jurisdiction in the second appeal to interfere with the finding of facts recorded by the First Appellate Court after careful consideration of the evidence, oral and documentary, on record and it was not open to the High Court to reverse the findings of the facts recorded by the Lower Appellate Court. In 2005 (10) SCC 38 (Manicka Poosali Vs. Anjali Ammal) the Apex Court has laid down that the High Court while exercising its power under Section 100 of CPC, on re-appreciation of the evidence cannot set aside the findings of fact recorded by the First Appellate Court unless the High Court comes to the conclusion that the findings recorded by the First Appellate Court were perverse i.e. based on misreading of evidence or based on no evidence. In yet another decision of the Supreme

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Court reported in 2004 (11) SCC 394, (Basavantaraya Patel Vs. Laxmibai and Others) the Honourable Supreme Court has laid down that the findings recorded by the First Appellate Court were based on appreciation of evidence, which could not be interfered with by the High Court in the Second Appeal. In the judgment reported in 2004 (5) SCC 762 (Thiagarajan Vs. Sri Venugopalaswamy B.Koil and Others) the Honourable Supreme Court has laid down that where findings of fact by the Lower Appellate Court are based on evidence, the High Court in Second Appeal cannot substitute its own findings on re-appreciation of evidence merely on the ground that another view was possible.

The present case is to be considered in the light of the above said principles laid down by the Honourable Supreme Court.

18. Though there is no scope for re-appreciation of the evidence, out of deference for counsel for the appellant, who wanted me to look at the evidence adduced by the defendants, I permitted him to place before me the material on record including evidence, which according to him was adduced by the defendants and which according to him does not prove the due execution of the Will Ex.B.1.

19. The learned counsel for the appellant drew my attention to the deposition of D.W.1 and pointed out the following answers elicited from D.W.1 in his cross-examination. D.W.1 has stated in his cross examination that because of blood pressure, he could not recollect as to what happened even the previous day and he is not capable of remembering as to what happened even half-an-hour earlier and he does not remember as to where Ex.B.1 was written, in which year month and date on which it was written. He does not remember whether the Will was written in the morning or in the evening. D.W.1 has stated that Ex.B.1 was written at the house of Ramachandran, but immediately he changed his version and told that Ex.B.1 was written at the house of scribe Palaniswamy Chettiyar and Ex.B.1 Will was written as per the instructions of D.W.1. D.W.1 has stated that in Ex.B.1 Will Savadammal affixed only one thumb impression. D.W.1 has admitted that Ramachandran took care of all the necessary things for the execution of Ex.B.1. But immediately he changed his version and stated that Ramachandran did not know anything about Ex.B.1 Will.

20. The learned counsel for the appellant also drew my attention to the evidence of D.W.2 and he points out that D.W.2 has stated that the Will was written as per the directions of Savadammal, which according to the learned counsel is contrary to

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what D.W.1 has deposed. Learned counsel also points out that D.W.2 has stated that the Will was executed in his house and he has also stated that Ramachandran was not present at the time when the Ex.B.1, Will was written which according to the learned counsel is contrary to the deposition of D.W.1. Learned counsel also points out that D.W.3 has admitted that for writing the Ex.B.1 Will, Ramachandran took Savadammal and the attesters, D.Ws.1 and 2. He has also pointed out that D.W.3 had admitted that her husband went to Saibaba Colony and obtained the signature of Rangaraj, one of the attesting witnesses. Learned counsel also has pointed out that D.W.3 has admitted that Savadammal was in the house of Raju Chettiar and Manickkam for two months before she was admitted in hospital and even before that she was not keeping good health and for six months prior to her death, she was not keeping well. On the basis of the above evidence of D.Ws.1 to 3, the learned counsel for the appellant submits that their evidence is not reliable and acceptable and he further submitted that prima facie, the circumstance that no share was made to the plaintiff and the sixth defendant by the testator, will make the Will appear unnatural.

21. Per contra, Mr. Raja Kalifulla learned counsel appearing for the respondent strenuously contents that the lower Appellate Court has considered all the above said portions of the evidence of D.Ws.1 to 3 and has chosen to believe their evidence and therefore this Court in a second appeal cannot re-appreciate the evidence and record a different finding. Learned counsel for the respondent further submitted that it is not a case, where the Lower Appellate Court has over looked any evidence or misread the evidence and it is not the submission of the learned counsel for the appellant that the finding of the lower Appellate Court is perverse. The learned counsel relying upon a judgment of the Apex Court reported in A.I.R.1995 SC 2086 (V.S.Mane Vs. R.V.Ganeshkar) submitted that a decision on facts arrived at by the First Appellate Court could not be disturbed in Second Appeal. The lower Appellate Court had after recording cogent reasons accepted the testimony of the two attesting witnesses and there is no reason to differ with the findings of the lower Appellate Court. Learned counsel for the respondents also relied upon a judgment of the Apex Court reported in A.I.R.1971 SC 2236 (Sushila Devi Vs. Krishna Kumar) wherein it is laid down as follows:-

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> "If the bequest made in a Will appears to be unnatural then the Court has to scrutinise the evidence in support of the execution of the Will with a greater degree of care than usual, because every person must be presumed to act in accordance with the normal human behaviour but there is no gainsaying the fact that some individuals do behave in an abnormal

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> manner. Judges cannot impose their own standard of behaviour on those who execute Wills. As observed by this Court in H.Venkatachala Iyengar Vs. B.N.Thimmajamma, (1959) Supp (1) SCR 426 = (A.I.R.1959 SC 443) that the mode of proving a Will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed by S.63 of the Indian Succession Act. Proof in either case cannot be mathematically precise and certain and so that test should be one of satisfaction of the prudent mind in such matters. The onus must be on the propounder and in absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and signature of the testator as required by law may be sufficient to discharge the onus. Where, however, there are suspicious circumstances the onus would be on the propounder to explain them to the satisfaction of the Court before the Will can be accepted as genuine".

Relying upon this judgment which has also been relied upon by the Lower Appellate Court, the learned counsel for the respondents submits that the mere circumstance that no share was made to the plaintiff and the sixth defendant by the testator will not make the Will appear unnatural. Since the execution of the Will is satisfactorily proved the fact that the testator had not bequeathed any property to the plaintiff and the sixth defendant cannot make the Will invalid. He further submitted that the Lower Appellate Court has considered these aspects and has rightly held that the exclusion of the plaintiff and the sixth defendant cannot make the Will invalid as the defendants had proved the due execution of the Will and have also dispelled all the alleged suspicious circumstances. Learned counsel also submits that the Court cannot impose its own standard of behaviour on the person, who executed the Will. Learned counsel for the respondents by relying upon on a judgment of the Apex Court reported in (Volume II (2005) S.L.T. 38, Sridevi and Others Vs. Jayaraja Shetty Others) submits that except the fact that the testator was old and she died within a short time after the execution of the Will, nothing is brought on record to show that the testator was not in good health and the learned counsel further submits that there is no averment in the plaint that the testator was seriously ill and she was not in a sound disposing state of mind. He further submitted that simply because, D.W.3 had admitted that the testator was not ill for over a period of six months prior to the execution of the Will and she was in the hospital for some time, that does not by itself Will show that the testator was not in a sound disposing state of mind.

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22. Countering the submission of the learned counsel for the appellant that the earlier Will executed by the testator was a Registered Will and equal distribution of property was made to the children and Ex.B.1 Will is not registered, the learned counsel for the respondents by relying upon a judgment of this Court reported in 1994 (1) MLJ 216, (Rajesh Vs. Raja) submits that though registration will go a long way to dispel the doubt as to the genuineness of the Will, when the execution is proved by cogent and acceptable evidence, the Court should not disbelieve the Will merely because it is not registered. He further submits that once a Will is proved to be true and it was executed by the testator, it is not for the Court to embark upon an enquiry, whether the dispositions made therein are fair and just.

23. I have gone through the judgment of the Trial Court as well as the judgment of the lower Appellate Court and oral evidence adduced in the case. As pointed out above, the Lower Appellate Court has independently considered the evidence of D.Ws.1 to 3 and the evidence of P.Ws.1 and 2. The Lower Appellate Court has rightly pointed out that the burden of proving the due execution of the Will, squarely lies upon defendants 1 to 5 and has also pointed out that the onus of proving the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and then signature of the testator as required by law is sufficient to discharge the onus. Thus, the Lower Appellate Court has applied the correct principles of law as laid down by the Supreme Court while considering the genuineness of Ex.B.1 Will.

24. The Lower Appellate Court has pointed out that D.Ws.1 and 2 have consistently deposed that Ex.B.1, Will was executed by late Savadammal and that Savadammal signed in Ex.B.1, Will, which D.Ws.1 and 2 have witnessed. Further, it is pointed out that the evidence of D.W.s.1 and 2 is cogent on the aspect, that Savadammal had seen both D.Ws.1 and 2 signing in the Will. The evidence of D.Ws.1 and 2 on the aspect of mental faculty of Savadammal and she had executed the Will on her own volition is natural and acceptable. The Lower Appellate Court has pointed out that both D.Ws.1 and 2 have categorically asserted that Savadammal was not in any manner pressurised to execute the Will. It has also pointed out that D.Ws.1 and 2 are not in the age group of the legatee Ramachandran and D.W.2 is an octogenarian and D.W.1 is in the age of 70 and it is quite natural and probable that Savadammal has chosen her close relatives who are elderly people as eye witness for executing the Will in favour of her younger son, Ramachandran. D.Ws.1 and 2 who are the meternal uncles of Ramachandran as well as the plaintiff and the sixth defendant, have no axe to grind against the plaintiff and

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the sixth defendant. As rightly pointed out by the lower Appellate Court this important aspect has been omitted to be considered by the Trial Court. While considering the evidence of P.W.2, the husband of the sixth defendant, who is one of the attesting witnesses to Ex.B.1, Will, the Lower Appellate Court has pointed out that P.W.2 while in the witness box admitted that Mr. E.A.Sardar khan is the Advocate for his wife, the sixth defendant and also he is the advocate appearing for the plaintiff. From this, the Lower Appellate Court has held that the plaintiff and her husband P.W.1 and P.W.2, the sixth defendant's husband have joined together and engineered the suit. There is no reason to differ with the above said finding. It is quite unbelievable that P.W.2 would have signed in a Will, which according to him did not contain the signature or thumb impression of Savadammal. P.W.2 has stated that he had not spoken to about the attesting of an unsigned Will to anyone including his wife before he deposed in the Court. This version of P.W.2 is quite unbelievable. Considering all the above said aspects, only the Lower Appellate Court has accepted the evidence of D.Ws.1 and 2, the attestors and rejected the evidence of P.Ws.1 and 2. The Lower Appellate Court has rightly held that the execution of Ex.B.1 Will has been duly proved by the defendants through the attesting witnesses, D.Ws.1 and 2 and the plaintiff has not proved the allegation of forgery. The Lower Appellate Court has also considered the alleged suspicious circumstances and has rightly held that the mere participation of the legatee Ramachandran in the execution of the Ex.B.1 Will, will not in any way affect the genuineness of the Will. The Lower Appellate Court has also noticed that the plaintiff and the sixth defendant have not been examined, whereas P.W.1 the husband of the plaintiff, and P.W.2 the husband of the sixth defendant, alone have been examined and P.W.1 is not assertive in his evidence that no such Will was executed by Sovdammal and P.W.1's answer is evasive, that he does not know whether Savadammal had left any Will.

25. The Lower Appellate Court has considered the exclusion of the daughter's namely plaintiff and the sixth defendant and noticed that the plaintiff and the sixth defendant are already married and they are in good position in life and that would have weighed with the testator, for not providing a share in the property to her daughters. The Lower Appellate Court has rightly held that the Court cannot sit over the subjective satisfaction of the testator and for reaching that conclusion the Lower Appellate Court has rightly relied upon the ruling of the Apex Court reported in A.I.R.1971 SC 2236. The Lower Appellate Court has pointed out that it is not imperative for the testator while executing the second Will to state the reasons for cancelling the earlier Will. I agree with the reasoning of the lower Appellate Court for interfering with the judgment of the Trial Court. I see no reason to differ from the conclusion arrived by the Lower Appellate Court on the various

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issues discussed above. The discrepancies pointed out by the learned counsel for the appellant in the evidence of D.Ws.1 to 3 are minor in nature and all those discrepancies have been considered by the lower Appellate Court. Sitting in second appeal, this Court cannot re-appreciate the evidence and come to a different conclusion. When it is not the case of the appellant counsel that the Lower Appellate Court's finding is perverse or the Lower Appellate Court has overlooked the material evidence or misread any material evidence, I do not think it proper to interfere with the findings of the Lower Appellate Court. The substantial question of law is answered by holding that the judgment of the Lower Appellate Court is not vitiated as it has applied the correct principles of law laid down by the Supreme Court of India while considering the genuineness of the Will.

26. Accordingly the Second Appeal fails and the same is dismissed. No costs.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

srk

To,

1. The I Additional District Judge
Coimbatore

2. The II Additional District Munsif
Coimbatore

3. The Record Keeper,
V.R. Section,
High Court, Madras.

1 cc to M/s. V. Nicholas, Advocate, Sr. 2494
1 cc to M/s. Hajee P.K. Jamal Mohamed, Advocate, Sr. 2411

S.A. No.946 of 1995

MSR (CO)
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